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NO. 35227-3-II-7-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

SAFE HARBOR FAMILY PRESERVATION TRUST,
a Washington trust

Respondent/Owner
FRED NOBLE and FAITH NOBLE, husband and wife,

Appellants,

v.

SAFE HARBOR FAMILY PRESERVATION TRUST,
a Washington trust

Respondent/Owner,

TILLICUM BEACH, et al,

Additional Respondents.

REPLY BRIEF OF APPELLANT

Michael W. Johns
WSBA No. 22054
Attorneys for Appellants
DAVIS ROBERTS & JOHNS, PLLC
7525 Pioneer Way, Suite 202
Gig Harbor, WA 98335
(253) 858-8606

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Respondents Fred and Faith Noble (hereafter the "Nobles") and Tillicum Beach admit and agree that the Nobles sued Tillicum Beach, thereby making it a party to the Nobles' action to condemn an easement by necessity. However, both argue, without any legal support, that Appellant Safe Harbor Family Preservation Trust (hereafter referred to as "Safe Harbor") rather than the Nobles should be required to pay Tillicum Beach's attorney's fees and costs. This Reply Brief first address the arguments of the Nobles, and then the arguments asserted by Tillicum Beach.

I. ARGUMENT

A. Reply To The Nobles' Arguments.

1. The Trial Court Abused Its Discretion In Discounting its Award of Attorney's Fees to Safe Harbor.

In their Response Brief, the Nobles assert that there is no evidence to suggest that the Trial Court abused its discretion in reducing Safe Harbor's attorney's fees by approximately 70%. Yet it is undisputed that the Trial Court significantly discounted Safe Harbor's attorney's fees based upon its determination that the majority of Safe Harbor's attorney's fees were incurred were as a result of Tillicum Beach's involvement in the case, for which it held Safe Harbor responsible. (CP 12-20)

Because, as discussed in more detail below, it was the Nobles, not Safe Harbor, who made the conscious and voluntary decision to sue Tillicum Beach, the Nobles, not Safe Harbor, were responsible for Tillicum Beach's involvement in the case. The Trial Court's basis for drastically reducing Safe Harbor's fees and costs incurred in responding to the Nobles' petition to condemn a private way of necessity was thus clearly erroneous, and must be reversed.

2. Safe Harbor Is Not Responsible For The Nobles' Decision To Add Tillicum Beach As A Party.

In their Response Brief, the Nobles admit that Sorenson v. Czinger, 70 Wn.App. 270, 276, 852 P.2d 1124 (1993) "may allow a condemnee to urge an alternative route even if the owners of the property involved are not parties." (Nobles' Brief, page 5.) But the Nobles then go on to ignore that clear legal precedent and make a new argument, not previously advanced before the Trial Court and without any legal support, that the Sorenson decision somehow conflicts with CR 19, and further that the Nobles were required, despite the clear language of Sorenson to the contrary, to add Tillicum Beach as a party.

The Nobles also ignore the clear language of CR 19, which only requires joinder of a party who by definition is indispensable. In addition to the clear language quoted above from Sorenson, the

Appellate Court in Kennedy v. Martin, 115 Wn.App. 866, 870, 63 P.3d 866 (2003) specifically stated that under RCW 8.24.025 "the failure to join a party does not prevent the court from considering an alternative route of a non-party if the evidence shows that it is feasible." (quoting Sorenson, 70 Wn.App. at 276).

Kennedy clarified that neither Safe Harbor nor the Nobles were under any obligation to add Tillicum Beach as a party in order to determine whether there was a more feasible alternative to using Safe Harbor's property. Either party could have called the officers and/or residents of Tillicum Beach as witnesses at trial to support their opposing positions without causing Tillicum Beach to incur the risk or expense of participation in the lawsuit as a litigant. But the Nobles nonetheless, and for their own benefit, chose to add Tillicum Beach as a party, thereby causing Tillicum Beach to incur those expenses.

Under the clear law set forth in Sorenson and Kennedy, the Nobles, not Safe Harbor, are responsible for Tillicum Beach's attorney's fees and costs incurred as a result of the Nobles' decision to sue Tillicum Beach.

3. The Prevailing Party Standard Does Not Apply To Safe Harbor's Request For Attorney's Fees and Costs.

Lastly, the Nobles argue that Safe Harbor should pay

Tillicum Beach's attorney's fees because it failed to prove that Tillicum Beach could provide the most feasible access and in effect did not prevail against Tillicum Beach. This argument again ignores the fact that Safe Harbor never added Tillicum Beach as a party or made a claim against it. Furthermore, RCW 8.24.030 is not predicated on the concept of the "prevailing party". Rather, it affords the condemnee, who is being judicially forced to encumber its property with an easement, to at least be compensated for the cost of defending against that claim, regardless of whether it prevails.

Tillicum Beach, as a condmenee also sued by the Nobles, is also entitled to an award of its attorney's fees and costs. But those fees and costs are properly awarded under the law set forth in Chapter 8.24 RCW, Sorenson and Kennedy against the Nobles, not Safe Harbor, as the Nobles were the parties responsible for adding Tillicum Beach as a party to the litigation.

B. Response to Tillicum Beach's Arguments.

Though Tillicum Beach spends a great deal of time in its brief re-arguing which of the alternate available access routes was least burdensome, a matter not at issue in this appeal, its entire argument as to why Safe Harbor rather than the Nobles should be

responsible for its fees can be found at pages 10 and 11 of its brief. There, Tillicum Beach acknowledges that if the Nobles had not sued Tillicum Beach the trial would have been solely "about Safe Harbor and the Nobles presenting evidence that the more feasible alternative would have been across either the Nobles' property or Tillicum Beach. Tillicum Beach would not have been a party." (Brief of Tillicum Beach at page 10.) Of course, this is precisely Safe Harbor's point.

But Tillicum Beach goes on to opine that, at such a trial, the Nobles would not have enjoyed the "same access to witnesses and evidence that Tillicum Beach itself enjoyed, nor did it (sic) have the same incentive." (Brief of Tillicum Beach at pages 10 and 11.) Tillicum Beach thus speculates that the Nobles may have lost such a trial without Tillicum Beach's active involvement. This argument only serves to prove that the only possible basis for the Nobles to add Tillicum Beach as a party was for their own benefit: to enlist Tillicum Beach's support for their argument that the easement they sought should be over Safe Harbor's property.

But the Nobles always had the affirmative burden of proving the absence of a feasible alternative. *See* Sorenson, 70 Wn.App. at 276, 852 P.2d 1124 ("The condemnor has the burden of proving the

reasonable necessity for a private way of necessity, including the absence of a feasible alternative.") The Nobles as the condemnors cannot under Chapter 8.24 RCW recover from Safe Harbor the costs and expenses incurred in meeting that burden, whether incurred directly by them or by a third party added by them to assist in meeting their burden.

By adding Tillicum Beach as a party, the Nobles shifted a large portion of the cost of meeting their burden of showing the absence of a feasible alternate route from themselves onto Tillicum Beach. The Nobles nonetheless remain responsible for those costs and must reimburse Tillicum Beach for those costs. To allow Tillicum Beach to recover those costs against Safe Harbor instead of the Nobles simply allows the Nobles to use a third party to shift their costs of meeting their affirmative burdens onto Safe Harbor, which is not allowed by either Chapter 8.24 RCW or the clear law articulated in Sorenson and Kennedy, supra.

Moreover, this argument flies in the face of the overwhelming balance of Tillicum Beach's brief, which is almost entirely devoted to demonstrating how little merit it believes Safe Harbor's claims had. Having devoted such a large portion of its brief to a gratuitous effort to portray Safe Harbor's position below as frivolous, Tillicum Beach

apparently does not see the irony of its argument that the Nobles nonetheless "were forced" to add Tillicum Beach as a party in order to prevail over Safe Harbor.

Regardless, Tillicum Beach provides no support for its assertion that the Nobles could not have used the same witnesses and evidence at trial as Tillicum Beach did. The Nobles most certainly could have subpoenaed and used the same witnesses and documents as Tillicum Beach, and did not need to add Tillicum Beach as party to do so.

Finally, Tillicum Beach asserts that the reason it continues to expend significant costs in this matter is that if Safe Harbor prevails on its appeal the Trial Court may need to re-determine the amount of its fees and it is unaware of any authority to serve as a guide for that determination. (Brief of Tillicum Beach at 14.) While irrelevant to the issues involved in Safe Harbor's appeal, this argument amply illustrates the lack of merit inherent in all of Tillicum Beach's arguments.

There is no mystery regarding the factors considered by a Court in awarding attorney's fees. Tillicum Beach clearly understood and addressed those factors in its motion below. CP 92-110. Tillicum Beach's motion for attorney's fees, while devoting

an inordinate amount of space to arguing Safe Harbor should be responsible for its fees, sought fees in the alternative from the Nobles. CP 92-110. Both Safe Harbor and the Nobles responded to the motion and each argued that the other should be liable for Tillicum Beach's fees. But neither party challenged the amount of fees claimed, which thus are not at issue. Consequently, if this Court reverses the Trial Court, it can also order the Nobles to pay the amount of fees previously awarded by the Trial Court, which the Trial Court has already found to be reasonable.

CONCLUSION

Safe Harbor did not assert any cause of action against Tillicum Beach or add it as a party. Instead, the Nobles made the voluntary decision to add Tillicum Beach for their own benefit. As the parties responsible for adding Tillicum Beach as a party, the Nobles are responsible under RCW 8.24.030 for Tillicum Beach's attorney's fees and costs incurred herein. The Trial Court thus erred in awarding judgment against Safe Harbor for any portion of Tillicum Beach's attorney's fees and costs.

The Trial Court also abused its discretion in reducing Safe Harbor's attorney's fees and costs by 70% due to Tillicum Beach's involvement in the litigation. Safe Harbor was not responsible for

that involvement and is entitled to recover all of its attorney's fees and costs reasonably incurred in response to the Nobles' condemnation petition, regardless of whether or not it prevailed at trial. In addition, Safe Harbor is entitled to an award of its attorney's fees and costs incurred in this appeal.

Respectfully submitted this 26th day April, 2007.

DAVIS ROBERTS & JOHNS, PLLC

MICHAEL W. JOHNS, WSBA #22054
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SAFE HARBOR FAMILY PRESERVATION TRUST, a Washington trust, Appellant, vs. FRED NOBLE and FAITH NOBLE, husband and wife, and TILLICUM BEACH, et al, Respondents.	NO. 35227-3-II AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
) ss.
County of Pierce)

PAMELA M. GIBSON, being first duly sworn on oath, deposes and says:

That on the 27th day of April, 2007, she mailed to:

Robert D. Wilson-Hoss
Hoss and Wilson-Hoss
236 West Birch Street
Shelton, WA 98584

by placing the same in an envelope; affixed proper postage thereto, sealed the same, and placed it in a receptacle maintained by the United States Post Office for such purpose, County of Pierce, State of Washington.

and she delivered to:

Robert L. Beale
McGavick Graves
1102 Broadway, Suite 500
P.O. Box 1317
Tacoma, WA 98401-1317

by depositing the same in a receptacle for ABC Legal Messenger Service to be delivered on April 27, 2007, the following items:

Appellant's Reply Brief and this Affidavit of Service.

Pamela M Gibson
PAMELA M. GIBSON

SIGNED AND SWORN to before me this 27th day of April, 2007.

Kristine R. Pyle
NOTARY PUBLIC in and for the State of Washington, residing at Yelm, WA
My Commission Expires: 9-4-09

KRISTINE R. PYLE NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 09-04-09